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No. 84-1529

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MARGARET M. HECKLER, Secretary of
Health and Human Services, Petitioner

v.

AMERICAN HOSPITAL ASSOCIATION, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for
the Second Circuit

DISABILITY RIGHTS EDUCATION & DEFENSE
FUND, INC.
WOMEN'S LECAL DEFENSE FUND

BRIEF OF AMICI CURIAE

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FUND, INC.
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BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

The Disability Rights Education & Defense Fund, Inc. (DREDF) is a not for profit benefit corporation founded in 1979 by disabled adults and parents of disabled children to address national long-term disability rights reform from the perspective that all disabled people have the right to lead full and integrated lives, with the freedomm and dignity guaranteed to all members of our society. Many of the disabled people and parents of disabled children whom DREDF serves have been given unduly pessimistic and limiting opinions from medical personnel which have turned out to be no more than unfounded speculation. Parents have been informed that their newborns would never be able to do things which they

can now do. Disabled adults have been told that they are not capable of performing jobs which they now hold. Employers often rely on the opinions of doctors to document the inability to hold the job.

Disabled people and parents of disabled children have an interest in assuring that stereotypes and speculation are not used as the basis for decision-making, whether in employment, education, or health care. Disabled people and parents look to Section 504 to ensure that decisions affecting their lives are free from discriminatory bias. The integrity of Section 504 is challenged by this litigation. Amicus seeks to preserve the intended purpose and scope of Section 504.

The Women's Legal Defense Fund, Inc., founded in 1971, is a non-profit membership organization of over1,200 members, with the purpose of challenging sex discrimination through litigation, public education, counseling, and other forms of advocacy. It has long been concerned with ensuring that civil rights protections be interpreted broadly to protect the interests of those whom they were meant to serve. The Women's Legal Defense Fund has thus filed numerous amicus briefs in this and other courts in cases involving the interpretation of civil rights statutes. In particular the Women's Legal Defense Fund is concerned with the implications of this decision for disabled women and parents of disabled

children as well a for its impact on the development of civil rights law.

SUMMARY OF THE ARGUMENT

The American Hospital Association asks this Court to decide, as a matter of law, that the decision to withhold nutrition or treatment to a child with disabilities is never discrimination within the meaning of Section 504. Heckler v. American Hospital Association, No. 84-1529, Brief of the Respondents American Hospital Association, et al., In Opposition [to Petition for Certiorari] (May 25, 1985). The history of discrimination against people with disabilities and the similar histories of discrimination

against racial minorities and against women, belie this proposition.[1]

This brief will demonstrate that people with disabilities are subjected to the same kinds of discrimination that have been used against other minorities and against women. It will draw into question the assumptions about people with disabilities which give rise to discriminatory actions.

There is no longer any question that racial and ethnic minorities are entitled to the application of the same medical standards as are applied to white patients. If a black child and a white child present the same treatable

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1. This brief does not address the particulars of the subject regulations, but rather, the more general question of whether Section 504 applies to newborns with disabilities.

condition, we expect the health care facility to provide the same treatment for one as is provided for the other. Race is no longer deemed a basis upon which to provide different care. The same is true if male and female newborns present the same treatable conditions. Similarly, a disabled child should not be subjected to a different standard of medical care solely because of disability. Medical judgments are not immune from discriminatory bias and should not be shielded from judicial scrutiny.

Stereotypes which are today considered unfounded or even deplorable, have at other times operated to exclude and segregate minorities, women, and disabled people. In health care, as well as in

education, employment, and all facets of life, different standards have been applied to racial minorities, women, and to people with disabilities, because of society's perception of them as "subhuman," as "sick," or as "inferior." Increased social awareness of the irrational bases for the stigma associated with being black, or Hispanic, female, or disabled, and the resulting barriers to their being accepted as equals, have led to legislative and judicial decisions that prohibit such discrimination.

It is still difficult for many to understand that the different treatment of people with disabilities is based on prejudiced and irrational bases. Many still assume that disabled children are excluded from school or segregated from

their nondisabled peers, because they cannot learn or because they need special protection. The absence of disabled coworkers is often considered confirmation of the obvious "fact" that disabled people can't work. Similarly, people assume that different medical standards should apply to patients with disabilities because of stereotyped assumptions about their abilities or their quality of life.

Yet the Congress recognized the parallel histories of people with disabilities and racial and ethnic minorities and women. As a result, the Congress based Section 504 of the Rehabilitation Act of 1973 on Title VI of the Civil Rights Act of 1964, and on Title IX of the Education Amendments of 1972. Section 504 evidences Congress'

recognition that, as with racial minorities and women, legislation was necessary to ameliorate widespread, institutionalized discrimination. Further, as with racial minorities and women, Section 504's antidiscrimination language acknowledges that many of the problems faced by people with disabilities are not an inevitable consequence of physical or mental traits themselves, but rather of the false perceptions and prejudices others hold about those traits.

Given the Congress' intention that Section 504 be applied consistently with Title VI, it follows that the protections of Section 504 apply from the moment of birth. It also follows that the United States Department of Health and Human Services did have

authority to issue regulations specifically addressing the application of Section 504 to disabled newborns in a hospital which received federal financial assistance.

Argument

I. In the Context of Education and Employment, Stereotypes About Racial Minorities, Women and People With Disabilities Have Resulted in Similar Manifestations of Discrimination and Have Been the Subject of Similar Legislative and Judicial Decisions.

Distorted perceptions and false beliefs as to the uneducability and intellectual inferiority of disabled people have resulted in educational discrimination and segregation. Similarly, biased perceptions about people with disabilities have prevented vast numbers of otherwise qualified employees from ever getting jobs. U.S.

Civil Rights Commission, Accommodating the Spectrum of Individual Abilities, 29-32 (1984) (hereafter, Spectrum). Those perceptions echo the beliefs held for generations concerning the uneducability and intellectual inferiority of racial minorities and women and have also resulted in their denial of educational and employment opportunities.

The theories which were used to discriminate against blacks and against the disabled, in employment and education, are notably similar. In 1912, for example, one author reflected popular sentiment when he described people with retarded intellectual abilities as :

> causative factor in the production of crime, prostitution, pauperism,

> illegitimacy, intemperance, and other complex social diseases ... The feebleminded are a parasitic, predatory class, never capable of self-support or of managing their own public charges in some form. They cause unutterable sorrow at home and are a menace and danger to the community. Fernald, The Burden of Feeblemindedness, M.J. of Psychoasthenics, 90 (1912).

Corresponding perceptions of blacks had been used to buttress slavery:

> 'look,' commanded a Georgia physician, 'at his [the black's] small brain, his deficient intellection, his small lungs and defective atmospherization, his increased liver, his black blood and sluggish circulation, his obtunded nervous sensibility, his enlarged glandular system, all pointing to a physical character, animal in its inclinations and wanting in those attributes of intelligence which elevate the white man and places him far above the brute.' K. Kiple, Another Dimension To The Black Diaspara: Diet, Disease, And Racism 181-182 (1981) (hereafter, Kiple).

Similarly, false perceptions and prejudices concerning women's innate educational inferiorities were based in the nineteenth-century on physicians' beliefs that education was unsuitable for women:

> A young woman, however, who consumed her vital force in intellectual activities was necessarily diverting these energies from the achievement of true womanhood. She would become weak and nervous, perhaps sterile, or more commonly, and in a sense more dangerously for society, capable of bearing only sickly and neurotic children -- children able to produce only feebler and more degenerate versions of themselves. The brain and ovary could not develop at the same time. Society, mid-century physicians warned, must protect the higher good of racial health by avoiding situations in which adolescent girls taxed their intellectual faculties in academic competition. "Why," as one physician pointedly asked, "spoil a good mother by making an ordinary grammarian?" Rosenberg, The Female Animal: Medical and

> Biological Views of Woman and Her Role in Nineteenth-Century America in Women And Health In America --Historical Readings 15 (J. Leavitt, ed. 1984) (citations omitted).

Prejudice as to the educational limitations of women relegated them to a separate and discriminatory system of education:

> There was a time when the most common idea was that [a woman] was better off with little education. Later the doctrine developed that she should not be denied education, but that her education should be of a special type, fitting her for her 'place' in society and usually directed more on training her hands than her brains.

Myrdal, G., An American Dilemma,, 1944, in Roots Of Bitterness: Documents Of The Social History Of American Women 144 (N. Cott, ed. 1972).

Discriminatory educational theories had destructive effects on

black children which exceeded the undermining of educational motivation, affecting the entire emotional, moral and spiritual development of the child. These effects were well documented, and were acknowledged by this Court in Brown v. Board of Education, 347 U.S. 483, 494 (1954).

The distorted perceptions of the ineducability and intellectual inferiority of black children posed additional barriers to their education.

> [There is a vicious cycle of actions and attitudes underlying the difficulties which have led so many educators to conclude that many of these children are uneducable and "hopeless." In this cycle cultural discrepancies and alienation tend to orient the children toward low educational commitment and accomplishment. This orientation appears to the school as evidence that a low level of expectation concerning learning by these children is justified. Hearings before House

> Subcommittee on Integration in Federally Assisted Education on H.R. 6938, 87th Cong., 2nd Sess. (March 1962), 105 (Statement of John Niemeyer, Pres. of Bank St. College of Education, N.Y., N.Y.).[2]

This "vicious cycle" syndrome is as painfully applicable for the education of disabled students as it is

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2 Also see, Gliedman and Roth, The Unexpected Minority, (1980), in which the authors discuss the close nexus between segregation and the classification of racial and ethnic minorities as mentally retarded.

> In New York State in the 1960's a black child was twice as likely to be classified as mentally retarded if he attended a racially mixed school than if he attended a school that was mainly black. In other words, when black children were not already receiving a segregated education by virtue of segregated residential patterns, the school frequently perpetuated segregation within the programmatic framework of integration by overlabeling black children as "mentally retarded." Id. at 179.

for racial minorities. First, the stigma of being disabled, which attaches in the primary grades, results in lifelong labeling.

> Experts agree that it is primarily the school which imposes the mentally retarded label and concommitant stigmatization on children, either initially or later on through a change in educational assignment. This follows from the fact that the school constitutes the first social institution in which the child comes into contact. PARC v. Commonwealth of Pennsylvania, 343 F. Supp. 279, 295 (E.D. Pa. 1972).

Second, educators at each level reinforce the stigma by rationalizing their own justifications for its existence. For example, a study of the University of California undergraduate and graduate programs, found a consistent pattern distinguishing faculty who had never dealt with

disabled students or colleagues, and those who had. Faculty who had never worked with disabled students:

> mentally experimented with the performance of their daily activities by asking themselves whether they could perform this or that task without hearing or sight or use of their limbs or voice. Encountering enormous imaginary problems in their mental experiments, respondents commonly concluded that their imagined problems accurately reflected the real difficulties and limitations of disabled people. D. Finnegan, Disabling For Disabled: Discrimination In Higher Education 8, Berkeley (1979).

These faculty simply rationalized their faulty assumptions and failed to recognize the myriad of systems disabled people develop to minimize the functional limitations imposed by their disabilities.[3]

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3. For the blind, for example, numerous (footnote cont'd)

As employment opportunities for blacks were limited by the perception that they were "animal" in their "inclinations" and intellectually inferior, and as women were excluded from the mainstream of the labor force because their destiny was to produce and care for healthy offspring, so too have disabled people been barred from employment because of society's biased perceptions. One author has summarized the perceptions that employers, and others, have held of disabled job applicants as follows:

> (a) the Subhuman Organism, (b) The Menace, (c) the Unspeakable Object of Dread, (d) the Object

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technologies exist which make reading possible, e.g., Kurtzweile reading machine (reads printed material aloud), Opticon (converts print into vibrations), and public and private libraries which convert print to Braille.

of Pity, (e) the Holy Innocent, (f) the Diseased Organism, (g) the Object of Ridicule, and (h) the Eternal Child. W. Wolfsenberger, The Principle Of Normalization In Human Services, 16-24 (1972).

Given these perceptions, there is little wonder that people with disabilities remain unemployed regardless of numerous studies reflecting the economic benefits of hiring people with disabilities and the relative inexpensiveness of supplying any necessary accommodations. U.S. Civil Service Commission, A Chain of Cooperation: Severely Physically Disabled Employees in the Federal Service, 3 (1976). The positive benefits of employing racial minorities and women were similarly dismissed as irrelevant when it was socially and legally acceptable to base employment

decisions on the race or sex of the applicant.

The discriminatory nature of policies and practices which exclude and segregate disabled people has been obscured by the unchallenged equation of disability with incapacity and by the gloss of "good intentions." The innate biological and physical "inferiority" of disabled people is considered self-evident. This "self-evident" proposition has served to justify the exclusion and segregation of disabled people from all aspects of life. The social consequences which have attached to being disabled often bear no relationship to the physical or mental limitations imposed by the disability. For example, being paralyzed has meant far more than being

unable to walk--it has meant being excluded from public school,[4] being denied employment opportunities,[5] and being deemed an "unfit" parent.[6]

Both case law and legislation reflecting professional attitudes toward people with disabilities paralleled case law and legislation affecting the civil rights of women and of racial minorities. In Plessy v.

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4. "Many of the physically handicapped children do have the mental ability to attend public school but are denied that right due to architectural barriers and/or transportation problems." 117 Cong. Rec. 42293 (1971).

5. 13 Spectrum, at 29-32.

6. "Historically, child-custody suits almost always have ended with custody being awarded to the non-disabled parent, regardless of whether affectional or socio-economic advantages could have been offered by the disabled parent." 1 Vash, The Psychology of Disability 155 (1981).

Ferguson, 163 U.S. 537 (1896), this court sanctioned segregation by referring to the Court's limited role in altering what was commonly accepted as the need to separate the races. Following Plessy, Jim Crow legislation extended to every feature of southern public life. H. Horowitz, K. Karst, Law, Lawyers And Social Change 129-30 (1969). Also see C.V. Woodward, The Strange Career Of Jim Crow (3d Rev. ed., 1964).

Similarly, beliefs about women's limited roles resulted in protective legislation. The legislation and the stereotypes on which they were based were reinforced by judicial decisions.

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. ...

> continuance for a long time on her feet at work, repeating from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race... Muller v. Oregon, 208 U.S. 412, 421-22 (1908).

Thus, when women entered the work force, they had limited opportunities. Those who were employed worked in jobs that were extensions of their household work (e.g., laundries, clothing and textile factories).

Although the number of women in the work force increased during the 20th century (20% of all women were working in 1900; 25% in 1940 and 43.8% in 1972), see The Economic Role of Women in 1973 Economic Report Of The President 91, reprinted in Hearings on

Economic Problems of Women before the Joint Economic Committee, 93rd Cong., 1st Sess. 6 (1973), most women still did not obtain professional positions. For example, in 1950, 6.7% of all physicians were women. In 1970, only 9.3% of all physicians were women. Only 22.4% of all college and university teachers were women in 1950; in 1970, 28.6%. Supplement to the 1973 Economic Report Of The President, supra at 155-159.

Blacks encountered similar barriers. Racial prejudice and discriminatory hiring and promotion practices accounted for the lack of equal employment opportunity. But even when discriminatory motives were not present, the effects of segregation and inferior education resulted in

increased barriers in securing jobs. See Hearings before House Subcommittee No. 5 of the House Judiciary Committee on H.R. 7152, 88th Cong. 1st Sess. 1780 (Statement of George Meany, President, AFL-CIO).

Black employees were "largely relegated to 'unskilled and semi-skilled jobs'" and, because the number of such jobs was rapidly decreasing due to automation, "the relative position of the Negro worker [was] steadily worsening." United Steelworkers, Etc. v. Weber, 443 U.S. 193, 204 (1979), citing 110 Cong. Rec. 6548 (1964), (remarks of Sen. Humphrey).

Each of the three groups has sought relief from discrimination in the courts and in Congress. Blacks were the first to succeed in Brown and

its companion case, Bolling v. Sharp, 347 U.S. 497 (1954).

Over fifteen years after Brown, analogous equal protection arguments were made with respect to mentally retarded children in PARC v. Commonwealth of Pennsylvania, supra, Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972), and Wyatt v. Stickney, 325 F.Supp. 781 (M.D. Ala. 1971). Each of these landmark decisions cited this Court's decision in Brown to support their holdings that disabled children were entitled to a public education to the same extent as their nondisabled peers.

Congress enacted the Civil Rights Act of 1964 to hasten desegregation efforts. The legislation adopted

several different approaches, including the prohibition, in Title VI of the Act, of discrimination on the basis of race, color, or national origin by recipients of federal funds. 42 U.S.C. §2000d et seq.

Women, following the example of the black civil rights efforts, sought redress by Congress and in the courts for discrimination. In education, Congress' response was embodied in Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, et seq. which prohibited discrimination in education on the basis of sex by recipients of federal funds. Congress based Title IX on Title VI in recognition of the similar types and effects of discrimination on both groups.

In employment, Congress found that

"an entire segment of our society is forced into a condition of marginal existence" because of racism that was the inevitable result of stigmatizing stereotypes. H.R. Rep. No. 914, 88th Cong., 1st Sess. 28 (1963) as reprinted in 1964 U.S. Code Cong. & Ad. News 2391. To combat this problem Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., which prohibited practices of discrimination on the basis of race, color, sex, religion or national origin by private employers, employment agencies, and labor unions. Congress expanded and strengthened Title VII in enacting the Equal Employment Opportunity Act of 1972. Pub. L. 92-261.

This court has recognized that

Title VII was

> intended as a spur or catalyst to cause employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

This court has also noted that:

> Before the Civil Rights Act of 1964 was enacted, an employer could fashion his personnel policies on the basis of assumptions about the differences between men and women, whether or not the assumptions were valid.
>
> It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females. City of Los Angeles, Department of Water and Power v. Manhart, 435 U.S. 702, 707, (1978).

Congress, in enacting Section 504 of the Rehabilitation Act of 1974 recognized that while there were major

physical and mental variations in different disabilities, disabled people as a group faced similar discrimination in employment, education and access to society. As stated in the Senate Report accompanying the 1974 amendments to the 1973 Act:

> Section 504 was enacted to prevent discrimination against all handicapped individuals,...in relation to federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided program. S. Rep. No. 1297, 93rd Cong. 2d Sess. 38, reprinted in 1974 U.S. Code Cong. & Ad. News 6373, 6388.

Disabled children's right to equal educational opportunity has also been established by Congress' enactment of PL 94-142: The Education for All Handicapped Children Act of 1975, 20 U.S.C. §1401 et seq.[7] As with Title VI of the Civil Rights Act of 1964 and

Title IX of the Education Amendments of 1972, the Congress intended that all children, regardless of race, or sex or the severity of disability, be provided a free appropriate public education and thereby reversed decades of discrimination that had been based on the professional opinions of educators who had, knowingly or not, incorporated unfounded stereotypes about each of these groups into their work.

The bases for the stereotypes about racial minorities and women are considered deplorable today. While stereotypes about people with

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7. PL 94-142 represents the culmination of trends towards increased federal involvement in the education of disabled chidren. A significant bulk of the requirements set out in PL 94-142 had already established in PL 93-380 (Education of the Handicapped Amendments of 1974).

disabilities are similarly outrageous, public attitudes have not yet caught up with Congress's recognition of that fact, as evidenced by this case.

As the next section demonstrates, health care professionals are not immune from stereotypical assumptions about people with disabilities. Furthermore, they were not immune from stereotypes about women and racial minorities, and they provided "scientific" bases that strengthened and perpetuated many of the stereotypes.

II. In the Context of Health Care, Stereotypes About Racial Minorities, Women And People With Disabilities Have Resulted In Similar Manifestations Of Discrimination And Have Been The Subject Of Similar Legislation

Throughout history, being

"handicapped has defined the role and the needs of people with disabilities.

> All political, legal, and ethical issues [have been] transformed into questions of disease and death, deviance and normal adjustment, proper and improper management of the disability. Gliedman and Roth, supra at 300.

As a result, the kind of health care that people with disabilities have been able to obtain has at times depended more on society's perception of the disabled as sick, and, therefore, inferior, than it has on the individual's specific health care needs.

Similarly, the view that black diseases resulted from the physical inferiority of the race, or from a divine plan for its extinction, were antithetical to any effort to understand the unique health

difficulties of blacks, and to determine their different nutritional requirements. Kiple, supra at 202-203.

Discrimination against women in health care was rooted in the analogous belief that women were physically inferior to men:

> To doctors [in the nineteenth century], women were so different from men as to constitute a sub-species. Corea, The Hidden Malpractice: How American Medicine Treats Women As Patients And Professionals 88 (1977).

For each of the three populations, sickness, and the concomitant need for medical care, was ascribed to the innate inferiority of the patient. In other words, the patient's state of health was always measured against the "normal", to wit, the white man. This approach permitted society to ignore

the miserable environmental conditions in which racial minorities lived. The epidemics of tuberculosis, pneumonia, and syphilis, as well as disproportionately high rates of still births and infant mortality, were ascribed to the failures of the patients themselves. Kiple, supra at 188.

Before the Civil War, the poor health conditions of blacks provided an additional rationale in support of slavery. It was thought that

> the unhappy physical and mental state of the Blacks made it imperative that a superior race direct and take care of them.

Kiple, supra at 180-181. Following the Civil War, Southern physicians, swayed by the new theories of Charles Darwin, justified white racism on "scientific"

grounds:

> The medical journals of the period almost bristle with writings of doctors eager to portray the black as a filthy, loathsome, disease-ridden creature who was not only a threat to himself and his own people but an epidemiologic menace to whites as well. For them the plight of the blacks was the result of "some supreme law... Id. at 189.

Women, too, suffered from this "blame theory" of medicine. If women became sick, it was because women were "inherently defective" Ehrenreich and English, Complaints and Disorders: The Sexual Politics of Sickness in Seizing Our Bodies: The Politics Of Women's Health 44 (C. Dreifus, ed. 1977). Headaches and nervous disorders were "linked with malfunctioning female sexual organs" A. Wood, "The Fashionable Diseases": Women's

Complaints and Their Treatment in Nineteenth-Century America in Women And Health Care In America-Historical Readings, supra at 223, as were all other medical complaints.

> Physicians saw woman as the product and prisoner of her reproductive system ... it was the cause of her most common ailments; woman's uterus and ovaries controlled her body and behavior from puberty through menopause. Rosenberg, supra at 13.

One consequence of this belief was women were also blamed for their illnesses if they abandoned "feminine pursuits" and behaved in contradiction to biological imperatives.

> ladies get sick because they are unfeminine--in other words, sexually aggressive, intellectually ambitious and defective in proper womanly submission and selflessness. Wood, supra at 227 (emphasis in the original).

People with disabilities have not been immune from the "blame theory" of medicine, both for their own illnesss and for creating health problems for society, as well.

> [Feeblemindedness] is responsible ... for the majority of cases of chronic and semi-chronic pauperism, and for much of our alcoholism, prostitution, and venereal diseases. L.M. Terman, Feeble-Minded Children in the Public Schools of California, 5 Schools and Society 161 (1971), cited in City of Cleburne v. Cleburne Living Center, U.S. , slip at 7, n.9 (1985)(Marshall, J., concurring and dissenting).

The solutions that society developed for eliminating the health menaces presented by racial minorities, by women, and by people with disabilities have been strikingly similar. Believing that blacks were at a lower evolutionary stage than whites,

some doctors argued for a hastening of the evolutionary extinction process through the sterilization of the entire black male population by vasectomy, a solution which would "bravely and humanely [solve] the greatest race problem of the ages." Kiple, supra at 189.

The same approach was used in the nineteenth century to correct, both medically and morally, women's health problems. Cures for women's diseases were:

> designed both as a punishment and an agent of regeneration for they forced [her] to acknowledge [her] womanhood. Ehrenreich and English, supra at 227.

For example, removal of both ovaries was frequently performed in the nineteenth century to cure feminine nonconformity--which included

"neurosis, troublesomeness, eating like a plowman, ... attempted suicide, erotic tendencies" among other deviant behaviors. Corea, supra at 95.

At the turn of this century, it was widely believed that if those with mental or physical disabilities were castrated or segregated, the source of all future social problems would disappear. R. Burgdorf, M. Burgdorf, The Wicked Witch is Almost Dead: Buck v. Bell, 50 Temple L.Q. 995, 997 (1977). When, in the 1890s, vasectomies and salpingectomies (cutting or removal of the fallopian tubes) were developed, the Indiana State Reformatory for the Mentally Retarded sterilized between 600 and 700 boys. Other similar institutions followed suit. Id. In 1907, the

Indiana Legislature enacted a sterilization statute, as did 28 other states by 1930. Id.

A major advance in the civil rights of racial minorities, women, and people with disabilities, in the health care context, came with the development of the principle of informed consent. Before that theory became firmly established, all three populations were at the mercy of "treatments" and medical experiments. For example, the Tuskegee experiments conducted between 1932 and 1972 by the United States Health Service, demonstrated the degree to which racism affected the medical profession. Some 400 black patients who had applied for treatment for syphilis went untreated so that the "natural history" of the disease could

be observed. Over 100 of these patients died. J. H. Jones, Bad Blood: The Tuskegee Syphilis Experiment 50 (1981).

Nor did women participate in decisions about their medical treatment. Male doctors, especially in the nineteenth century, "preferred to keep women in ignorance" Wood, supra at 228). As one Philadelphia physician wrote:

> Wise women chose their doctors and trust them. The wisest ask the fewest questions. Mitchell, Doctor and Patient (1888), 48, quoted in Wood, supra at 228.

For people with disabilities, the result of the segregation theories, some based on the need to protect society from the disabled and others based on the disabled's need to be protected from society, Spectrum, supra

at 32-35, was the creation of large, closed institutions. Once inside the institutions, the physically disabled, mentally retarded, and mentally ill became the subjects of medical experiments, of psychotropic drug therapy, electroconvulsive therapy, psychosurgery, and aversive behavioral therapies--all in the absence of informed consent. Id. In addition, they became "an easily exploited source of organ transplants." Id. at 36.

The most publicized example of research involving the institutionalized mentally retarded was the hepatitis experiment at the Willowbrook State School in New York. In an attempt to develop a vaccine for the disease, researchers infected otherwise healthy children, many of

whom became seriously ill.[8] Like the infamous Tuskegee experiment, see supra at ____, the researchers took advantage of their subjects because of their "easy availability, their compromised position, and their manipulability." Id.

In other words, women, racial minorities, and people with disabilities suffered at the hands of a profession which reflected prevalent social and political attitudes. Medical standards of care were defined

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8. Litigation challenging this "experiment" resulted in a court-approved consent decree prohibiting medical experimentation, New York State Association for Retarded Children v. Rockefeller, 357 F.Supp. 752 (E.D.N.Y. 1973) as reported in Report and Recommendations of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, 43 Fed. Reg. 11328, 11345-51 (March 17, 1978).

by an image of the nondisabled, white, male patient. For one reason or another, the medical profession treated women, racial minorities and the disabled according to some lesser standard that better suited the perceived inadequacies of the group as a whole. The medical profession itself has recognized this fact.

For example, infants born with disabilities who have been subjected to different medical standards from those applied to nondisabled newborns are a prime example of this phenomenon. The clearest explanation for this fact comes from surveys of physicians. In studies conducted in 1975, 1976, 1977, and 1982, the majority of physicians responded that they would not act to save the life of a Down's Syndrome

child if the parents -- presumably after being counseled by the same doctors -- agreed not to have a life-saving procedure performed. President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Decisions to Forego Treatment 208, fns. 46, 47, 48, 49 and accompanying text. One of the studies found that, apart from parental desires, "59% of the pediatricians surveyed in Massachusetts would not recommend surgery for a Down's Syndrome infant with intestinal blockage." Id., fn. 48.

A study showing that "pediatricians were significantly more pessimistic about the ultimate abilities of mentally retarded adults

than psychologists and educators," suggested that the differences among the professionals resulted from the pediatricians' lack of education. Wolraich and Siperstein, Assessing of Professionals' Prognostic Impressions of Mental Retardation, 21 Mental Retardation 8 (February 1983). "Pediatric training typically involves minimal exposure to mental retardation," (Task Force on Pediatric Education, 1978). Id. at 10.

Congress has been well aware that the medical profession is not immune from prevailing stereotypes and has acted to assure that bias does not result in discriminatory treatment. The primary avenue of attack on racial discrimination in health care facilities has been Title VI of the

Civil Rights Act of 1964. In fact, discrimination in health care was one of the reasons that Congress enacted Title VI. See, e.g., 110 Cong. Rec. 7054 (1964)(remarks of Sen. Pastore).

In 1965, HEW issued its first set of regulations interpreting Title VI. 45 CFR Part 80. The regulations prohibit not only discriminatory denial of treatment, but any form of differential or segregative treatment based on race, color, or national origin. 45 CFR §80.3(b)(1). They also prohibit facially nondiscriminatory policies which have the indirect effect of subjecting individuals to discrimination through, for example, criteria or methods of administration, or through site location for facilities. 45 CFR §80.3(b)(2).

Consistent with the Title VI regulations, HEW published §504 regulations which include a specific section on prohibited practices in health care. 45 CFR Part 84, Subpart F.

Title VI, Section 504, and Title IX have been successful in addressing many of the barriers faced by women, racial minorities, and people with disabilities. As a result of these statutes, and of supportive judicial decisions, society's attitudes toward members of these three groups have had the opportunity to evolve toward theories of pluralism and away from stigmatizing stereotypes. The medical profession, like all other professions, has recognized the role that public attitudes have played in medical

decisionmaking. One author specifically noted the impact of Section 504 and P.L. 94-142 on medical decisions with regard to disabled newborns, after reciting findings that substantially more disabled newborns are helped to survive than was true four years before.

> Social change is another likely explanation for the increased frequency with which parents have asked for early surgical treatment of an infant, despite a poor prognosis... Perhaps parents are less likely to be deterred...by the prognosis for disabilities (wheelchair mobility and intellectual limitation) in an era when it is more acceptable for a disabled person to remain in the community. J. McLaughlin, et al., Influence of Prognosis on Decisions Regarding the Care of Newborns With Myelodysplasia, 312 N.E.J. of Med. 1589(6/20/85).

III The Protections of Section 504, Like the Protections of Title VI, Apply At Birth

One of the questions presented in this case is whether Section 504 applies at birth. There is nothing in the literal language of the statute to suggest otherwise.[9] Nor is there anything in the legislative history of Section 504, or of Title VI, on which Section 504 is based,[10] to suggest otherwise.

The legislative history of Section 504 reflects the fact that Congress intended the statute to cover discriminatory health practices for all patients. See Statements of

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9. "No otherwise qualified individual in the United States. ..." 29 U.S.C. 794.

10. See Community Television of Southern California v. Gottfried, U.S. , 103 S.Ct. 885, 892 (1983). Other amicus briefs develop the legislative history of Section 504.

Congressman Vanik, 117 Cong. Rec. 45974 (1971), and Senator Humphrey, 118 Cong. Rec. 525, 9495, 9499, 9500 (1972). Further, as is more fully developed in other briefs, the Congress modeled Section 504 on Title VI, and intended their coverage to be consistent. See Alexander v. Choate, 105 S.Ct. 712 (1985).

The administrative history of Title VI clearly reflects that the Department of Health, Education and Welfare understood that Congress intended Title VI to be enforced to protect newborns from discrimination. Soon after Title VI was enacted, HEW surveyed hospitals throughout the country. The survey instrument was called the "Medical Facilities Compliance Report" and it asked

questions about every area of the hospital, including nursery facilities.

HEW also published "Guidelines for Compliance With Title VI of the Civil Rights Act of 1964" shortly after the enactment of Title VI, to assist hospitals in bringing their facilities into compliance. See L. Terry, Hospitals and Title VI of the Civil Rights Act, 39 Hospitals, Journal of the American Hospital Association (Aug. 1, 1965). The Guidelines state at the outset that:

> Hospitals in compliance with the Act are characterized by absence of separation, discrimination or any other distinction on the basis of race, color, or national origin in any activity carried on, in, by or for the institution affecting the care and treatment of patients.

The Guidelines elaborate by prohibiting discrimination in the provision of any

treatment, to any patient.

Finally, HEW successfully prosecuted hospitals for failing to desegregate their delivery rooms and nurseries. See, In the Matter of Board of Trustees of State Eleemosynary Institutions, Natchez Charity Hospital, et al., Docket No. MCR-59, Administrative Proceeding in the Department of Health, Education and Welfare (1/13/69). As a result of this administrative hearing, HEW terminated federal financial assistance to the three named hospitals.[11]

If Section 504 is to be applied in a manner consistent with Title VI, as

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11. In judicial litigation, HEW enforced Title VI for all hospital patients. See, e.g., Bryan v. Koch, 627 F.2d 612 (2d Cir. 1980).

the Congress intended, then it follows that the protections of Section 504 apply at birth.

Conclusion

Theories about the inherent limitations and weaknesses of women, racial minorities, and the disabled have fueled discrimination against the three groups. The blatancy of gender and race discrimination has faded as laws and judicial decisions have reflected and spurred changes in attitude. Attitudes toward people with disabilities are often still reminiscent of the race and gender attitudes of eighty years ago.

In 1973, Congress based Section 504 on Title VI and Title IX. It did so to address discrimination in the

same way, and for the same reasons, that it had chosen to address discrimination in the earlier statutes.

This Court has applied Section 504 to hold that people with disabilities are entitled to work, Consolidated Rail Corporation v. Darrone, ___ U.S. ____, 104 S.Ct. 1248 (1984) and to have meaningful access to medical care, Alexander v. Choate, supra. This Court has relied on the Constitution to find that people with disabilities are entitled to live in the community, City of Cleburne v. Cleburne Living Center, supra and it has relied on P.L. 94-142 to find that students with disabilities are entitled to be educated with their non-disabled peers, Board of Education v. Rowley, 458 U.S. 176 (1982). Without the right to discrimination-

free medical decisions at birth, the rights to education, work, housing, and medical care become meaningless. Respondent's authority to regulate in this area is consistent with the decisions of this Court and with the administrative history of Section 504.

For the foregoing reasons, Amicus respectfully submit that the Court reverse the decision below.

Respectfully submitted,
CENTER FOR LAW AND SOCIAL POLICY

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